IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 414 OF 1988

(1) Sow. Satyabhamabai w/o
Shivaji Patil.
(2) Shivaji Kondiba Patil .. **Appellants.**

v/s.

Rama Gunda Pandhare. .. **Respondent.**

Mrs. A.N.Helekar, advocate h/f Shri B.P.Apte for appellants.

None for respondent.

CORAM: A.S.OKA, J.

DATE : 9th July, 2004.

ORAL JUDGEMENT :-

1. This Second Appeal was admitted on 21st November, 1988. The order passed by this court while admitting the Second Appeal reads thus :-

> "Mr. Apte is heard. The substantial question of law is whether the right claimed by the Appellants has been misconstrued by the district

court as dependant on the drawing of water from the well and whether non-drawal of well water is proof of the extinction of the right ? Admitted."

I have heard the counsel appearing for the Appellants on the substantial question of law as framed at the time of admission of Second Appeal. None appears for the Respondent. The Appellants are the Plaintiffs and the Respondent is the Defendant. The Appellants filed a suit claiming that they are the owners of the land bearing in Gat No. 318 of village Gundewadi, Tal. Miraj, Dist. Sangli. The case of the Appellants is that they have right to draw water from a well situated in land bearing Gat No. 317 which is held by the Respondent/Defendant. The case of the Appellants is that the said right to draw water from the well was sought to be obstructed by the Respondent and therefore, the suit is filed for perpetual injunction restraining the Respondent from interfering with 1/2 ownership of the Appellants over the said well as well as the right in respect of the equipments attached to the said well for drawing water. The suit was resisted by the Respondent. In the Written Statement, the Respondent contended that he is the owner of land

bearing No. 317 and the Appellant has no right in respect of the said well and in any case, the owner of land bearing Gat No. 318/1 had not withdrawn water from the said well for last 25 years.

2. The trial court decreed the suit. The trial court relied upon the registered sale deed executed by one Namdeo Tukaram Patil in favour of the Appellants. The trial court relied upon the oral evidence laid by the Appellants. Trial Court also referred to entries made in the record of Rights in respect of Gat No. 318/1 and 317. Considering oral and documentary evidence on record, the trial court held that rights of the Appellants were established. In an Appeal preferred by the Respondent, the District Court has set aside the decree passed by the trial court. The Appellants have, therefore, preferred this Second Appeal.

3. The appellate court was influenced by the fact that the suit is for simplicitor for perpetual injunction and that the Appellants or predecessors had not drawn water from the said well for a considerably long time. The Appellate Court observed that the entry in the 7/12 extract in respect of Gat No. 317 and 318

is a solitary entry made for a period of only one year and the appellate court has observed that the said entry appears to have made without any enquiry.

4. The learned counsel appearing for the Appellant submitted that the entries in the 7/12 extract of both the properties recorded that owner of land Gat No. 318/1 had 1/2 share in respect of the well in Gat No. 317. The learned counsel submitted that there is nothing on record to rebut the presumption of correctness of the entries in the revenue record. The learned counsel relied upon the recitals in the sale deed executed in favour of the Appellants. The learned counsel also relied upon a document dated 5th April, 1918 which refers to the right to use the well. She submitted that the findings recorded by the appellate court are perverse and therefore interference is required under section 100 of the Code of Civil Procedure,1908.

5. I have considered submission made by the learned counsel appearing for the Appellants. The learned Additional District Judge in paragraph No.8 of his Judgment referred to the entries in 7/12 extracts. The learned Judge has observed that

> "The sheet anchor or the main-stay of the Plaintiff's case is the entry in remarks column of V No.12. This entry is for single year 1967-68 that too in V.F.No. 12. It is entered that the suit well is common well. I fail to understand as to how this entry came to be from blue all of a sudden."

The learned Judge has come to the conclusion that the entry is for single year i.e. 1967-68 and therefore, he stated that it is difficult to understand as to how the entry came to be made all of a sudden. After having perused the Record, in my view, the said observation is based on complete misreading of the Documents on record. The 7/12 extract which is produced contains 3 different parts - first is the column showing the name of the Kabjedar, the second is the cultivation column and third is the column recording the other rights. The Document at Exhibit 4 is an 7-12 extract of the Gat No. 318/1 containing entry in cultivation column of the year 1978-79. In the other rights column, there is a clear reference to right to draw well water in a well in land bearing Gat No.317. The Exhibit 5 is 7-12 extract in respect of Gat No.317 showing entry of the year 1978-79 in

Cultivation Column. The other right column clearly refers to existence of right to use water in the well in favour of the owner of land bearing Gat No. 318/1. In both the extracts, entry in other rights column is not only the year 1978-79. Only the entries in Cultivation Column are made for a specific year. The learned Judge proceed on erroneous assumption that the entry in the other rights column in case of 7/12 extract in both the lands is only for one year. On the contrary the Respondent in his oral evidence has stated that he filed his objections with Talathi as regards the said entry 40 years ago and the Talathi did not take into consideration that objection. I have gone through the record of the trial court for the purpose of verifying the original marathi deposition. The same statement is found in marathi deposition. Therefore, it is very clear that the learned Judge totally misread the said documents by erroneously observing that entry in the other rights column is only for a period of one year. It is reflected from the deposition of the Respondent himself that the entry is a long standing entry. No evidence is led by the Respondent to establish that the entry was either illegally made or the said entry was subsequently deleted. Apart from the said entry, there was evidence in the form of

registered sale deed in favour of the Appellants.

5. The learned Additional District Judge appears to have been influenced by the fact that the suit is for perpetual injunction and according to the Respondent the entries in the Revenue Record do not show that the land owned by the Appellants was under cultivation on the date of the institution of suit. It is to be noted that the perpetual injunction is as regards obstruction by the Respondent in exercise of the right of using well vested in the Appellants. Therefore, even assuming that the water in the well was not being drawn by the Appellants on the date on which the suit was instituted, the suit will not become defective. If existence of right to draw water from the well is established by Appellants, the Appellants are entitled to perpetual injunction unless it is shown by the Respondent that the said right has been extinguished in some manner.

6. In paragraph No.8 of its Judgment, the Appellate Court has observed that no perpetual injunction can be granted in favour of the Appellants as the Appellants have not made out a prima facie case. Approach of the Appellate Court appears to be totally erroneous.

7. Findings of fact recorded by the trial court have been upset by the Appellate Court by recording a finding as stated above in paragraph No.8 of its Judgment. It is very clear that findings of the Appellate Court are based on misreading of the material evidence on record and therefore, findings are perverse. It is also apparent that the right claimed by the Appellants was totally misconstrued by the learned Additional District Judge. The Appellate Court's reasoning is perverse. The decree passed by the trial court could not have been set aside. Hence Second Appeal is allowed. The Judgment and decree passed by the Appellate Court is quashed and set aside and Judgment and decree passed by the trial court is restored. There is no order as to costs.

JUDGE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.414 OF 1988.

DATE OF DECISION : 9TH JULY, 2004.

FOR APPROVAL AND SIGNATURE OF

THE HON'BLE SHRI JUSTICE A.S.OKA.

1. Whether Reporters of Local Papers may be allowed to see the Judgement ?

2. Whether to be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of the Judgement ?

4. Whether this case involves a substantial question of law as to interpretation of the Constitution of India 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the judgement should be sent to Nagpur, Aurangabad & Goa Offices ?

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